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No. 287

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

RESERVE LIFE INSURANCE COMPANY, a corporation
Petitioner,

v.

DONALD E. MARR, as Executor of the Estate of Mary I. Marr, Deceased, *Respondent.*

RESPONDENT'S REPLY BRIEF TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FIELDING H. FICKLEN,
West 1115 Broadway Avenue,
Spokane 1, Washington.

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STATEMENT

A civil action was commenced in July, 1956, in the State Court on two policies of hospital insurance issued by petitioner to Mrs. Marr on May 4, 1954. Petitioner, a Texas corporation, removed the suit to the United States District Court for the Eastern

District of Washington (R. 4-6) on diversity of citizenship, respondent's ward residing in Washington. After trial before the Court, decision finding that there had been substantial compliance with the definition as contained in the policies was given in favor of respondent (R. 159-160) followed by Findings of Fact, Conclusions of Law (R. 27) and Judgment (R. 36), standard procedure in both State and Federal Courts in Washington.

The two policies contained identical definitions of the word "hospital" as used in the wording of a condition therein to the effect that in order to recover the insured must "be necessarily confined within a recognized hospital" (Policy J) or "be necessarily confined within a recognized hospital (as defined in part 2 hereof)" (Policy A). That definition is as follows:

> "The word 'hospital' wherever used in this policy means an institution which has a laboratory, x-ray equipment and an operating room where major surgical operations may be performed, and which maintains permanent and full time facilities for the care of overnight resident patients under the supervision of a licensed Doctor of Medicine or Osteopathy and which has a Graduate Registered Nurse always on duty."

There was substantial material evidence admitted in the trial that Jane O'Brien Hospital has been a recognized hospital in the area for ten years (R. 70, 74). Evidence proved that the hospital had 40 rooms,

61 beds, a Graduate Registered Nurse always on duty, x-ray equipment, laboratory, (nurses take blood samples, but most of lab work is sent out to Physicians Clinical Laboratories, managed by a doctor specializing in Pathology), arrangements with Sacred Heart Hospital, 1½ blocks away, where major surgery could be performed on Jane O'Brien Hospital patients, each patient under the supervision of a medical doctor, permanent and full time facilities for the care of overnight resident patients. (R. 77, 78, 79). Also had acutely ill, post operative, orthopedic, the aged, psychiatric patients and on occasions pediatric cases. (R. 80). X-ray pictures were taken and turned over to a doctor specializing in Radiology for reading and interpretation. (R. 80-81).

No provision in either policy limited the hospital services to general hospitals, or to a hospital certified by or accredited by any national association of hospitals or association of doctors. No particular type of hospital was excluded from the coverage.

From an adverse decision Petitioner appealed to Circuit Court of Appeals, 9th Circuit, where after Briefs and Argument before that Court, the decision of the District Court was unanimously affirmed April 23, 1958, (App. 6a) and re-hearing denied May 27, 1958 (App. 9a).

RESPONDENT'S ARGUMENT

I

To Petitioner's Reason 1.

Upon a trial without a jury, in which the Court found the issues in favor of Plaintiff, the Appellate Court must take that view of the evidence most favorable to the Plaintiff. *Kansas City Stockyards Co. v. Anderson*, 36 A.L.R. 2d. 1, 199 F. 2d. 91. *Worthington v. McDonald*, 47 A.L.R. 2d. 135-Iowa, 68 N.W. 2nd. 89. *Keller Products Inc. v. Rubber Lining Corp.* 47 A.L.R. 2d. 1108, 213 F. 2d. 382.

It is not the function of the Court on appeal to weigh evidence or draw inferences therefrom; it may not re-try doubtful issues of fact and substitute its judgment for that of the trial court. *United States v. First Security Bank of Utah*, 42 A.L.R. (2d.) 951, 208 F. (2d.) 424.

The Appellate Court is prohibited, under Rule 52(a) of the Federal Rules of Civil Procedure, from setting aside the trial courts' Findings of Fact unless it is clearly erroneous. *Lassiter v. Guy F. Atkinson Co.*, 21 A.L.R. (2d.) 1313, 176 F. (2d.) 984.

The Findings were supported by substantial evidence and authorized the Conclusions of Law and the Judgment of the District Court.

While the number of cases construing hospital policies are rather limited, they hold that the policies should be liberally construed to carry out the beneficient purposes for which the insurance was issued. Vol. I. Appleman, Insurance Law and Practice, Section 705, Disability and Specific Loss where this text says:

> "Where there is any ambiguity as to hospital benefits recoverable, a rather liberal construction will be taken to afford protection to the insured."

This section of Appleman cites in Note 27, *Colorado Life Co. v. Polk,* 83 S. W. (2d) 534, and in the pocket supplement of Vol. I. Appleman is cited *McKinney v. American Security Life Ins. Co.* 76 So. (2d) 630 (La. App. 1954) and *Hesse v. U. S. F. & G. Co.* 143 Ore. 700, 21 P. (2d) 1090.

Borglund v. World Ins. Co. (Ore) 315 P. (2d) 158, in its opinion quotes with approval *National Life and Accident Ins. Co. v. Davies* 34 Ala. App. 290, 39 So. (2d) 697, 700, certiorari denied 252 Ala. 107, 39 So. (2d) 703, which is quoted page 161 of 315 P. (2d) as follows:

> "This policy should be construed according to its character and its beneficient purposes, and in the sense in which insured had reason to suppose it was understood. It is not a question of what the words contained in the contract literally or figuratively mean, but instead what was their intended meaning when taken in connection with their use in the instrument."

The identical definition of a hospital as contained in Petitioner's policies issued in 1954 to Mrs. Marr has been construed in *McKinney v. American Sec. Life Ins. Co.* (La. App. 1954) 76 So. (2d) 630. The Louisiana hospital, the Court held, substantially fulfilled the definition even though it had all of its x-ray work done in a near by town, and did not have a Registered Nurse on duty at all times. This McKinney case has been cited with approval by the Supreme Court of Louisiana in *Seguin v. Continental Service Life Ins. Co.* 89 So. (2d) 113, 230 La. 533; 55 A.L.R. (2d) 1014. Also by the Federal District Court in *Pipes v. World Ins. Co.* 150 Fed. Sup. 370, U. S. Dist. Ct. West. Dist. La. The annotation in 35 A.L.R. (2d) 897 and A.L.R. Supplement Service under that annotation entitled "What constitutes a 'hospital' within coverage or exclusionary clauses of hospitalization policy" cites McKinney v. Am. Sec. Life Ins. Co. and other cases on this subject.

Following the cases cited above it clear that both the District Court and the 9th C.C.A. followed, accepted and usual judicial proceedings in deciding and affirming the instant case, and also followed all federal and state cases that have decided hospitalization policies.

II

Respondent's Argument on Petitioners Reason II for Granting the Writ.

Both hospital policies were drawn by a Texas corporation, make no reference to any statutes of Washington. They were issued to Respondent's ward in May, 1954, and at that time became a contract between the parties. Revised Code of Washington 70.41.020 cited by Petitioners is new legislation first enacted in 1955. In 1954 Revised Code of Washington 70.40.020 defined a hospital to be for the purpose of that legislation: . . . "'Hospital' includes public health centers and general, tuberculosis, mental, chronic disease and other types of hospitals, and related facilities, such as laboratories, out patient departments, nurses homes and training facilities, and central service facilities operated in connection with hosptals . . ."

A check reveals no decisions of the Supreme Court of Washington on any of the state statutes relating to hospitals. The limited number of cases from all jurisdictions construing hospital policies may be found in an annotation at 35 A.L.R. 897 following the Washington case of *Rew v. Beneficial Standard Life Ins. Co.* 41 Wn. (2d) 577, 250 P. (2d) 956, 35 A.L.R. (2d) 891 entitled "What Constitutes a 'hospital' within coverage or exclusionary clauses of hospitalization policy". In Rew v. Beneficial Standard Life Ins. Co. the policy specifically excluded nursing

homes and convalescent homes. Where the evidence showed that Valley View Convalescent Home was both in name and in fact a convalescent home the lower Courts decision for insured was reversed.

There is no conflict with decisions of the State of Washington either. As early as 1905 the Supreme Court of Washington in *Starr v. Aetna Life Ins. Co.* 41 Wash. 199 at page 203, said . . .

> "It is the established and universal law that insurance policies are to be construed in favor of the insured, and most strongly against insurance companies. This is a reasonable rule, considering the fact that these policies are prepared by men who are learned in the law and trained in preparing contracts of this kind, and who have studied the legal effects of all the multifarious provisions in the ordinary insurance policies, whether accident or life; while the insured are frequently men and women of limited understanding, of simple methods of thought, and who, as a rule, would not be capable of technically construing doubtful provisions in a contract. Speaking of this proposition, it was said by the Supreme Court of Alabama in *Equitable Accident Ins. Co. v. Osborn* 90 Ala. 201, 9 South. 869, 13 L.R.A. 267:
>
> > "Exceptions of this kind are construed most strongly against the insurer, and liberally in favor of the insured. This is now the settled rule for construing all kinds of insurance policies, rendered necessary, especially in modern times, to circumvent the ingenuity of the insurance companies in so framing contracts of this kind as to make the exceptions unfairly devour the whole policy' " . . .

And in 1949 the Supreme Court said that a policy of insurance will be liberally construed in favor of the object to be accomplished and conditions and provisions therein will be strictly construed against the insurer. *Jack v. Standard Marine Ins. Co.* 33 Wn. (2d) 265, 205 P. (2d) 351.

Rew v. Beneficial Standard Ins. Co. 41 Wn. (2d) 577, 250 P. (2d) 956 (1952), 35 A.L.R. (2d) 891 had this wording in its policy:

> "The word hospital as used in this policy shall not include a rest, convalescent or nursing home."

There was no such exclusion in the Reserve policies of specific types of institutions in the instant case. These differences distinguish the Rew case from the instant case. The Rew case is the only Washington case included in 35 A.L.R. 897 annotation or its supplement.

Assuming that thousands of policy holders pay annual premiums to Petitioner aggregating twenty million dollars on policies with the same definition of a hospital as contained in the Marr policies here sued on, the question which is of manifest importance to them is that when loss occurs under the policy that some of this twenty million dollars in annual premiums be used to pay their claims without prolonged

litigation as in the instant case. The right to collect the premiums incurs the duty to pay when both a U. S. District Court and a Circuit Court of Appeal have ruled that payment is due.

CONCLUSION

Far from departing from accepted judicial procedure the Circuit Court of Appeals has followed it. To have reversed the District Court would have flouted Rule 52(a) Federal Rules of Civil Procedure and settled law on Appellate procedure both State and Federal. It would have also reversed the entire trend of all the courts that have passed on hospitalization policies.

There is no state decision in Washington, nor in any other state, that is in conflict with the instant case. Most of the decisions on this type of contract have been cited in this Brief. All are in harmony with the decision of the Circuit Court in this case. Nothing in these policies, with the possible exception of additional proof on the question of what is a recognized hospital, refers to or depends upon the statutory law of Washington.

Again it appears to Respondent that Petitioner is re-arguing the facts, ignoring established rules of construction by Circuit Courts of Appeal of Findings of District Courts, and in essence and in substance is calling for the right of appeal in this case on the general supervisory powers of the Supreme Court.

when in the exercise of sound judicial discretion the privilege of certiorari is not warranted, and, of course, should not be granted, and especially so in private litigation involving no substantial public interests.

Respectfully submitted,

FIELDING H. FICKLEN,
Attorney for Respondent.